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In the Supreme Court of the United States

OCTOBER TERM, 1975

EARL L. KRAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecution's failure to ask a government witness whether he had made a hearsay statement attributed to him by another witness was inconsistent with petitioner's right of confrontation and constituted prosecutorial misconduct.

An indictment returned in the United States District Court for the District of Colorado charged petitioner with having conspired to make or cause to be made false representations in an application to the Small Business Administration (SBA), in violation of 18 U.S.C. 371.[1] More specifically, the indictment charged that in order to obtain approval of an SBA guarantee of a $180,000 loan to the Simeone Brothers Potato Company, petitioner and others

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[1]The indictment also charged petitioner with one substantive count of having made such representations, in violation of 18 U.S.C. 1001. The court dismissed the substantive count at the close of the government's case.

had conspired to misstate (a) the financial condition of the company and (b) the intended purposes of the loan.

After a jury trial, petitioner was convicted and was sentenced to fifteen months' imprisonment, to run consecutively with a sentence imposed in a separate proceeding. The court of appeals affirmed (Pet. App. A-1 to A-12).

The evidence at trial is set forth in the opinion of the court of appeals and may be summarized as follows. Petitioner was an officer of the First National Bank of Fleming, Colorado ("First National"), and a long-time friend and associate of the Simeone brothers. In early 1970, Anthony Simeone (an unindicted co-conspirator) discussed with petitioner the poor financial condition of the brothers' wholesale potato company. Simeone testified that petitioner told him that he knew someone at SBA and that he might be able to arrange an SBA guaranty for a loan from First National to Simeone (III, 246-247),[2] but that the loan "might cost something" (III, 247).

Petitioner, Simeone and Walter Meisel, the accountant for the Potato Company, met to prepare an application for an SBA guaranty on a $180,000 loan that would be made by First National. Meisel testified (II, 20) that at this meeting, petitioner suggested that certain assets and liabilities on the company books not directly related to the wholesale potato operation should be left off the loan application, or else the company would not have a "good chance to get the loan."

The application was made with the suggested deletions (II, 31-32, 124; III, 254; Govt. Exh. 1). Upon SBA's approval of the loan guaranty, First National disbursed the funds to the potato company account. Meanwhile, a check for $15,000 had been drawn on that account payable to Dant

[2]Transcript references are to the volume and page of the record on appeal.

Slack, a potato dealer and creditor of the Simeones (Govt. Exh. 29; III, 249). Slack cashed the check two days later, and it cleared the company account when the only funds available in the account were the SBA loan proceeds.

Slack simultaneously purchased a $15,000 cashier's check which he sent to Simeone by airplane (II, 152-155). Simeone and petitioner picked up the check at the airport and cashed it the same day, receiving $15,000 in $100 bills which Simeone gave to petitioner. Petitioner then deposited $7,000 in currency in his personal savings account at a Sterling, Colorado, bank; he used another $7,000 of the funds to purchase a participation in the unguaranteed 10 percent portion of the SBA loan to Simeone, paying in $100 bills (Govt. Exhs. 18, 37, 38; II, 53-55, 80, 126-133). Simeone's loan application filed with SBA, which was signed by petitioner, had stated that $160,000 of the proceeds were to be used for "Working Capital—Inventory" and the remaining $20,000 for "Acquisition and/or Repair of Machinery and Equipment" (Govt. Exh. 40).

Called as a government witness, Dant Slack testified that in December 1970 he had discussed with Anthony Simeone a debt owed him by the Simeones. According to Slack, during that conversation Simeone told him that "he [Simeone] had to give Mr. Kramer [petitioner] $15,000 to get the loan" (II, 151). Defense counsel did not cross-examine Slack (II, 161).

Later, the government called Anthony Simeone as a witness. He testified that petitioner had discussed with him "the fact that [the SBA guaranteed] loan might cost something" (III, 247), and recounted his involvement with petitioner in sending a $15,000 check to Slack, then receiving a $15,000 cashier's check from Slack which they

cashed, after which petitioner kept the proceeds (III, 249-250). The prosecution did not ask Simeone whether he had made the statement to Slack quoted above. Neither did defense counsel ask Simeone about the statement on cross-examination.

1. Petitioner contends (Pet. 7-13) that Slack's testimony reporting Simeone's remark that he had to give petitioner $15,000 to obtain the loan was a critical piece of evidence establishing the diversion of the loan proceeds and that that testimony was improperly admitted because the prosecution called Simeone as a witness but did not ask him whether he had made the statement. Petitioner contends that (Pet. 12) "this Court should adopt a standard requiring that an available co-conspirator [here Simeone] be the only source for the introduction of hearsay statements."

However, this Court has not held that the Confrontation Clause requires that the government produce an available declarant to testify directly — and be cross-examined — regarding an out-of-court statement. Indeed, the Court implicitly rejected such a rule in *Dutton* v. *Evans,* 400 U.S. 74, 89, in which the State did not call the declarant as a witness and made no attempt to show his unavailability.

Moreover, here, the prosecution produced the declarant Simeone as a government witness and thereby made him available to the defense for cross-examination. Petitioner thus not only had the opportunity to cross-examine Slack on the factual question whether he had actually heard Simeone make the statement but to cross-examine the declarant, Simeone, as well. Thus no question of failure to produce a declarant is present.

2. Petitioner also contends (Pet. 13-15) that the prosecutor's failure to question Simeone about his statement to Slack was unethical conduct. However, the prosecutor's failure to ask Simeone about the hearsay statement when he had called him as a witness and thereby exposed him to cross-examination was not conduct "calculated to produce a wrongful conviction" (*Berger* v. *United States,* 295 U.S. 78, 88). If in fact the prosecutor's failure to make the inquiry of Simeone bespoke his fear that Simeone "could not have substantiated the statement" (Pet. 14), then the prosecutor had equal reason to fear the defense would question Simeone about the statement on cross-examination. It is more likely that the prosecutor did not ask Simeone about the statement because in his view it was cumulative of Simeone's more damning in-court testimony regarding the "cost" of the loan and the subsequent actions of petitioner, Slack, and himself to divert a portion of the loan (see pp. 3-4, *supra*).

Petitioner has no legitimate complaint about the prosecutor's action since petitioner could have questioned the declarant and should not be allowed to reverse his own tactical choice not to avail himself of the opportunity to do so.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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